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**‘Six Honest Serving-Men’:  
Climate Change Litigation as Legal Mobilization and the  
Utility of Typologies**

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**Abstract**

As the legal character of approaches to climate change has increased in complexity, so the volume of litigation has burgeoned, at various levels and across a range of jurisdictions. The growth in complexity is witnessed in various forms, including the shift from the treaty lawmaking of diplomats and negotiators to that of the ordinary national (and sub-national) legislator and by the development in climate change mitigation financing of networks of private and public entities. Similarly, the causes of action are various, as are the pertinent regulatory regimes and motivations of those bringing claims. Scholarly explorations of this phenomenon have followed, focusing variously on single levels of courts, implications at particular levels, considerations for particular bodies of extant law, considerations for particular bodies of climate change law, the merits of such actions, as well as theoretical engagements with the case law within the context of approaches to various bodies of law. The approach of this article is more ecumenical. Its potential 'dataset' is the entirety of climate change caselaw rather than discrete themes within it and it attempts to discern patterns across the piece, to systematize the claims, and thereby create a typology to be deployed and developed in future analyses.

**Keywords**

Climate change, litigation, typologies, mobilization.



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A complex legal regime has evolved to frame climate governance, encompassing interconnected public international law, transnational law and private law elements. At the core of the international effort remain the UNFCCC and Kyoto Protocol, which have spawned innovative features such as carbon trading mechanisms and a sophisticated compliance regime. Municipal legislative action dealing with mitigation and adaptation is gathering pace.

The focus of *Climate Law* is on the many legal issues that arise internationally and at the state level as climate law continues to evolve.

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# **‘Six Honest Serving-Men’<sup>†</sup>: Climate Change Litigation As Legal Mobilization and the Utility of Typologies**

Navraj Singh Ghaleigh\*

## **I. INTRODUCTION**

As the legal character of approaches to climate change has increased in complexity, so the volume of litigation has burgeoned, at various levels and across a range of jurisdictions. The growth in complexity is witnessed in various forms, including the shift from the treaty lawmaking of diplomats and negotiators to that of the ordinary national (and sub-national) legislator and by the development in climate change mitigation financing of networks of private and public entities.<sup>1</sup> Similarly, the causes of action are various, as are the pertinent regulatory regimes and motivations of those bringing claims. Scholarly explorations of this phenomenon have followed, focusing variously on single levels of courts,<sup>2</sup> implications at particular levels,<sup>3</sup> considerations for particular bodies of extant law,<sup>4</sup> considerations for particular bodies of climate change law,<sup>5</sup> the merits of such actions,<sup>6</sup> as well as theoretical engagements with the case law within the context of approaches to various bodies of law.<sup>7</sup> The approach of this article is more ecumenical. Its potential ‘dataset’ is the entirety of climate change caselaw rather than discrete themes within it and it attempts to discern patterns across the piece, to systematize the claims, and thereby create a typology to be deployed and developed in future analyses.

The discussion commences with a brief account of the relationship between climate change and international law, one which is increasingly complex and diverse (Part II). Part III surveys recent

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<sup>†</sup> *I keep six honest serving-men  
(They taught me all I knew);  
Their names are What and Why and When  
And How and Where and Who.*  
R Kipling, *Just So Stories: For Little Children* (1903).

\* Lecturer in Public Law, Edinburgh Law School, the University of Edinburgh. This paper was developed in the course of the 2009 University of Edinburgh seminar series, “The EU, Climate Change and Global Governance” (<http://tinyurl.com/ahdv47>), and in particular the third of those seminars, “Climate Change in the Courts”. The series was co-organised by Chad Damro, Elizabeth Bomberg and myself and generously supported by the Europa Institute. I am grateful to all the seminar participants for their contributions to the dialogue, to Alexander Zahar for his patient encouragement and to the anonymous referees for their improving suggestions. I am particularly indebted to my LLM “Law of Climate Change” students and grateful for the excellent research assistance of Thomas Horsley and Eimear O’Hanrahan. The usual disclaimers apply.

<sup>1</sup> C. Streck, *Governments and Policy Networks: Chances, Risks, and a Missing Strategy*, in *A Handbook of Globalisation and Environmental Policy: National Government Interventions in a Global Arena* (F Wijen, K Zoeteman & J Pieters eds., 2005).

<sup>2</sup> T Stephens, *International Courts and Climate Change: ‘Progression’, ‘Regression’ and ‘Administration’*, in *Reveling in the Wilds of Climate Change Law* (R Lyster ed., 2010).

<sup>3</sup> DB Hunter, *The Implications of Climate Change Litigation for International Environmental Law-Making*, Washington College of Law Research Paper No. 2008-14.

<sup>4</sup> A Boute, *The Protection of Property Rights under the European Convention on Human Rights and the Promotion of Low-Carbon Investments*, 1 *Climate Law* ??? (2010) and K Miles, *Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes*, 1 *Climate Law* ??? (2010).

<sup>5</sup> NS Ghaleigh, *Emissions Trading Before the European Court of Justice: Market Making in Luxembourg*, in *Legal Aspects of Carbon Trading: Kyoto, Copenhagen and Beyond* (D Freestone & C Streck, eds., 2009).

<sup>6</sup> See E A Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 *U. Pa. L. Rev.* 1925 (2007).

<sup>7</sup> HM Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, in *Adjudicating Climate Change: State, National, and International Approaches* (WCG Burns and HM Osofsky, eds., 2009).

accounts of the nature of climate change litigation within the context of the political-scientific literature of ‘legal mobilization’ before arguing in Part IV for the utility of a set of conceptual variables that are collectively exhaustive and mutually exclusive – that is, are broad enough to capture all the relevant data and yet sufficiently differentiated as to produce a framework for analysing the array of case law when the variables are combined. Part V populates the framework, or matrix, with a survey of prominent climate change cases, drawing from the full range of relevant jurisdictions and fora. The conclusion (VI) makes the case for typologies, arguing for their capacity to reveal patterns and make tentative predictions about future case law. In so doing Kipling’s ‘six honest serving-men’ will be engaged.

## II. THE SHADOW OF INTERNATIONAL LAW

Talk of ‘traditions’ in the context of climate law scholarship is likely premature. Whilst lawyers have addressed the problematic of anthropogenic climate change and legal responses to it for near on two decades,<sup>8</sup> it remains a sub-discipline still determining its boundaries, nature, and methods. Most would nonetheless agree that the general course or tendency of the literature has been to locate the subject within the province of public international law. In this vein (and unsurprisingly perhaps, given his then role as President of the International Court of Justice), Sir Robert Jennings declared in 1991 that since climate change “is a global problem, it can only have a global solution. So the *only possible answer* is that it must be brought about through the development of appropriate international law.”<sup>9</sup> Subsequent developments of international law have added questions of adequacy to those of appropriateness. Moreover, solutions other than the development of appropriate international law have emerged from regional,<sup>10</sup> national,<sup>11</sup> and sub-national<sup>12</sup> legal regimes addressing GHG mitigation and to a lesser extent adaptation. *Pace* Jennings, whilst international law has been the earliest and perhaps to date principal driver of legal responses to the problematic, it has not been the ‘only possible answer’. In a world that is organized in a fashion more complex than Jennings could possibly have imagined, one in which the rival claims of intergovernmentalism and systems of multilevel governance spar for interpretive supremacy, it is scarcely surprising that mechanisms, procedures, and sites of authority not located at the multilateral level have emerged. The oft-noted innovative character of the Kyoto Protocol’s flexibility mechanisms in authorizing the direct implementation of environmental projects by non-state actors contributes greatly to this process of complexification. By establishing a framework under which the international/nation law dyad is radically recalibrated, we may note the emergence of,

new collaborative network structures of nation states and non-state actors ... giving non-state actors a variety of voluntary, semi-formal, and formal roles in formulating policy responses and implementing international agreements. Partnerships are of particular relevance when it comes to translating international commitments enshrined in a treaty into local action. The widening gap in implementing international and national law commands the testing of innovative arrangements and collaborative efforts to achieve environmental benefits.<sup>13</sup>

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<sup>8</sup> International Law and Global Climate Change (D Freestone & R Churchill, eds., 1991).

<sup>9</sup> *Ibid.*, *Preface* at ix. Emphasis added.

<sup>10</sup> The largest scheme to date is the European Union’s Greenhouse Gas Emissions Trading Scheme, based on Directive 2003/87/EC. See V.3. below for a fuller discussion.

<sup>11</sup> The United Kingdom’s *Climate Change Act 2008* claims to be the world’s first legally binding long-term framework to cut emissions, by 34% by 2020 and by 80% by 2050.

<sup>12</sup> The Scottish *Climate Change (Scotland) Act 2009* - an emanation of the devolved Scottish Parliament - creates a binding framework to reduce the territory’s GHG emissions by 42% by 2020 and by 80% by 2050.

<sup>13</sup> C. Streck, *Financing Climate Change Mitigation Under the UNFCCC*, in *Handbook of Innovations in Transnational Governance* (T Hale and D Held, 2010 forthcoming).

As politics and processes around the world and at myriad levels regulate to mitigate and adapt it is now well established that climate law has shifted decisively from its hitherto default home in the bosom of public international law. In the very short term this vector has only gained in magnitude after the commonly perceived shortcomings of the Copenhagen conference.

Quite apart from the descriptive shortcoming of failing to appreciate the multileveled character of climate change law, accounts that focus on conventional international law and its ‘law making’ processes have tended to give little recognizance of the developmental role of litigation, and dispute settlement mechanisms more generally, in the advancement of relevant law. Here again, the looming presence of international law is at play. As Birnie, Boyle & Redgwell note:

Litigation has played only a limited role in the development of international environmental law ... Even where agreed rules are set out in a treaty, there may be uncertainty about the proper forum or the applicable law if the dispute straddles several treaties or the jurisdiction of the forum is limited ... Moreover, judicial proceedings and arbitration tend to be less well adapted to the multilateral character of many environmental problems than supervision by meetings of the parties to treaty regimes, including non-compliance procedures.<sup>14</sup>

The argument herein is that what may have held for the broader field of international environmental law certainly does not for its rapidly developing progeny. Courts have had a significant role in the development of climate law in a variety of ways. This article argues that a more systematic approach to the caselaw’s categorization yields dividends of conceptual clarity and greater understanding of regulatory regimes as well as of the principal actors, their motivations, and perhaps even insights into the future of legal mobilization in this realm.

### III. LITIGATION, LEGAL MOBILIZATION, AND EMERGING PATTERNS

The persistence of international cooperation not to be able to generate solutions to climate change is in some respects perfectly predictable. To adherents of collective action theory, the paralysis of the international system is almost a given.<sup>15</sup> For present purposes this is important insofar as it creates ‘litigation opportunity structures’ in which extant law is deployed in ways which are perhaps unanticipated but serviceable for the purposes of addressing climate change. Such litigation *may* be undertaken for motives that are ‘progressive’ or consistent with such outcomes in their desire to seek emission reductions, but regressive motives and outcomes are equally plausible, as discussed below. With the great diversity of interests potentially implicated by anthropogenic climate change, it is not surprising that the range of deployed legal regimes is broad, including tort (negligence, nuisance, and misrepresentation, among other actions), human rights (domestic and international), investment, trade and energy law, and general environmental law at its various levels and of its various sub-disciplines. What then to make of the plethora of cases being handed down by tribunals that, in one way or another, implicate climate change, and what of the anterior question – how to define climate change litigation? As to the definitional question, under its rubric fall uses of court or tribunal processes aiming to secure emission reductions (or some other ‘climate change good’) or stymie attempts to do the same. Such aims need not be the primary purpose of the action or motivation of the plaintiff, but commonly feature in the arguments of parties.

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<sup>14</sup> P. Birnie, A. Boyle & C. Redgwell, *International Environmental Law and the Environment* 252 (3 ed., 2008).

<sup>15</sup> Supra note 6. Posner’s argument - based on the contention that since a healthy climate is a public good and public goods are non-excludable, states are incentivized not to cooperate in its production – is an interpretation of collective action theory that is not uncontested, see in particular E Ostrom *A Polycentric Approach for Coping with Climate Change*, World Bank Policy Research Working Paper Series (2009).

The more general study of litigation, the uses to which it is put, and motivations of key actors has garnered intense scholarly attention in recent decades, though not principally by lawyers. Characterized as a form of activism or popular engagement to generate political and policy change, ‘litigation as legal mobilization’ has emerged as a significant area of study at the meeting points of law and political science, especially in the US. Starting from reflections on the connection between litigation promoted by the civil rights movement which drove major societal change,<sup>16</sup> legal mobilization has since been generalized in its application and objects of study. The following definition by Zemans captures the purpose of legal mobilization, its key actors, and normative valencies:

the law is ... mobilized when a desire or a want is translated into a demand as an assertion of rights ... The individual citizen can be a true participant in the governmental scheme as an enforcer of the law without representative or professional intermediaries ... [the law can thus] be considered quintessentially democratic, although not necessarily egalitarian if the competence and the means to make use of this access to governmental authority is not equally distributed.<sup>17</sup>

The relevant ‘user’ of law was in early studies taken to be the private citizen,<sup>18</sup> giving the process of litigation as legal mobilization the character of a ‘bottom up’ process, focusing as it did on non-officials and those who may be the least powerful of private citizens (female, minority, or low-income citizens) in a society. Alternatively, but in a similar vein, the users may be activist groups associated with the previously parenthesized citizens, or others, such as environmental or labour groups. Studies have also identified litigation as just one of many potential phases in often dynamic and multi-threaded processes of disputation. Accordingly, success before a tribunal need not be, and indeed often is not, the measure of ‘success’, highlighting the notion of courts being embedded in complex networks of social and statal interaction<sup>19</sup> in which actors may extract a variety of benefits, ranging from the traditional remedies the courts have at their disposal to the opportunity to publicize a cause, exert pressure on adversaries and allies alike, and frame arguments in particular ways for tactical ends. The latter phenomenon has been described by Mnookin and Kornhauser as the “shadow” cast by official law and legal processes over more informal negotiations and dispute resolution mechanisms.<sup>20</sup> In these cases, the purpose of litigation is precisely to avoid the courtroom, which can thus be characterized as a site of legality, whilst legitimacy can be sought outside its environs albeit by way of its processes. Others have similarly characterized litigation as a sub-optimal means to achieve desirable social reform or resolution to social problems,<sup>21</sup> and such debates are commonplace and vibrant within administrative and human rights law, among other branches. *Pace* the more optimistic predictions of the promise of ‘bottom up’ mobilization, post-critical legal studies approaches have unsurprisingly recognized that citizens’ capacity to mobilize law is often tightly linked to their access to wealth, expertise, and organizational and other resources, thereby sustaining rather than subverting the status quo. This has in turn led to the phenomenon of citizens deploying confrontational positions vis-à-vis law as a response to “law’s hegemonic pact with unequal power and systemic domination”.<sup>22</sup>

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<sup>16</sup> See generally, M McMann, *Litigation and Legal Mobilization*, in The Oxford Handbook of Law and Politics (KE Whittington, DR Kelemen & GA Caldeira, eds., 2008).

<sup>17</sup> FK Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, Am. Pol. Sci. Rev. 77 (1983) 695, 700.

<sup>18</sup> L Nader, *Law in Culture and Society* (1979).

<sup>19</sup> J Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (1996).

<sup>20</sup> RN Mnookin & L Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce*, Yale L. J. 88 (1979) 951.

<sup>21</sup> G Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) and RA Kagan, *Adversarial Legalism: The American Way of Law* (2003).

<sup>22</sup> M McMann and T March, *Law and Everyday Forms of Resistance: A Socio-Political Assessment*, 15 *Studies in Law, Politics, and Society* 207-236.



By deploying this literature in a straightforwardly positivistic manner, questions of how law is used in the climate change litigation context, and to what end, loom large. Who are the applicants in such actions? Are they repeat or one-off players? Are they governments or NGOs, and at what level do they operate? Is law deployed in a purely instrumental fashion to achieve certain ends and, if so, what are they? Is it to advance specific interests and achieve concrete, climate-related, goals? To alter institutional relationships and practices? And by what level of (in)formality are they achieved? How does success ‘at bar’ relate to success cast in the terms of plaintiffs?

A return to the literature of climate law finds that rudimentary categorizations of the case law have emerged hard on the heels of the cases themselves. Gerrard’s<sup>23</sup> survey distinguishes between administrative law claims, civil claims, and public international law claims – a straightforwardly disciplinary-based division. The scheme certainly helps to analyse common problems of standing, liability, remedies, and the appropriate role of courts, but contributes little to our understanding of how and why these cases are generated. Nor does the categorization provide a normative apparatus by which the case law might be considered. To be fair, *Global Climate Change and US Law* seeks to do none of these things and should not be criticized for not matching standards it did not seek to match. However, coupled with its limited jurisdictional scope (as suggested by the title) these limitations render Gerrard’s scheme unserviceable for the larger task of developing a fully fledged sense of what parties and courts are doing when engaging in climate change litigation.

Of considerably greater interest is Stephens’ attempt to systematize climate change litigation.<sup>24</sup> Whilst focusing on international litigation, the argument helpfully develops categories or ‘types’ of international proceedings that cut across disciplinary boundaries, namely progressive, regressive, and administrative proceedings. The first of these categories ‘piggy backs’ on the plethora of national, tort-based litigation that has dominated the landscape of US climate change litigation.<sup>25</sup> Noting that these cases have invariably failed – for want of demonstrable causation or because courts declare such ‘political’ matters to be non-justiciable – the conclusion of futility in the international context is resisted on the basis that such actions “enhance the visibility of climate change in planning decisions.”<sup>26</sup> In a similar fashion, whilst public law cases (invariably planning cases) have had only a marginal success in requiring development proposals to take account of their greenhouse gas implications, they have had an impact on executive decision-making processes and more broadly in ‘educating’ decision-makers into considering ‘climate change arguments’. Transposed to the international level, says Stephens, a similar logic operates with greater force, as the available legal tools provide “a better fit with the scale of the climate change problem”; moreover, principles of customary international law establish governmental liability for transboundary pollution by way of the *Trail Smelter Case*<sup>27</sup> and its memorialization in Principle 21 of the Declaration of the UN Conference on the Human Environment<sup>28</sup> and elsewhere.<sup>29</sup> The example is mooted of possible proceedings before the ICJ between Himalayan states and the US in respect of the retreat of the Himalayan glaciers.<sup>30</sup> Noting again the difficulties of establishing causation, the procedural impediment of jurisdiction<sup>31</sup> is acknowledged, pointing to the ultimate

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<sup>23</sup> See MB Gerrard, *Introduction and Overview*, in *Global Climate Change and US Law* (MB Gerrard ed., 2008); Hunter *supra* note 3.

<sup>24</sup> *Supra* note 2.

<sup>25</sup> For a synoptic view, see DA Grossman, *Tort-Based Climate Litigation*, in *Adjudicating Climate Change: State, National, and International Approaches* (WCG Burns and HM Osofsky, eds., 2009).

<sup>26</sup> *Supra* note 2.

<sup>27</sup> *Trail Smelter Case* (Canada/United States of America) (1938 and 1941) 3 RIAA 1911.

<sup>28</sup> UN Doc A/CONF.48/14Rev.1 (1973).

<sup>29</sup> See Stephens *ibid* at n.36, 37, 38.

<sup>30</sup> Drawing on the argument in R Verheyen, *Climate Change Damage and International Law* 279-329, 287 (2005).

<sup>31</sup> It being unlikely that all parties would submit to the compulsory jurisdiction of the ICJ, quite apart from the uncertainty surrounding temporal aspects of this argument - see *IPCC Statement on the Melting of Himalayan Glaciers*, IPCC Press Release, Geneva, 20 January 2010.

goal of such proceedings as being the highlighting of the issue and bringing political pressure to bear on ‘offending’ parties. The routine goal of a claimant, a positive and binding decision issuing from a tribunal, is here ancillary. The avenue of international and regional human rights instruments is discussed in similarly cautionary terms, although, somewhat anomalously, dispute settlement under the UN Law of the Sea Convention is not. ‘Progressive’ proceedings on this analysis are therefore limited to those before international tribunals, have little prospect of substantive success, and as such are initiated principally for purposes of heightening awareness, mobilizing public opinion and civil society, and ultimately pressurizing governments into adopting more environmentally friendly policies.

More briefly accounted for are ‘regressive’ proceedings, which according to Stephens are likely to occur in,

regimes that do not have an environmental focus [in which litigation] may be used strategically to stymie progressive climate change policies adopted by governments. Nowhere are the prospects of this type of litigation more evident than in the context of the WTO as inevitably there is a high degree of overlap between climate change policies and international trade law that may potentially lead to conflict.<sup>32</sup>

The examples given refer to the oft-discussed challenge of ‘carbon’ border-tax arrangements, whilst acknowledging the extensive discussions of this and cognate issues at past COPs<sup>33</sup> and in policy circles.<sup>34</sup> In any event, the basic notion that litigation may subvert rather than support the goal of tackling climate change requires little explanation. A policy challenge of the scale of climate change will inevitably require new and bold legal instruments, mechanisms, and approaches that will cause disbenefits to certain vested interests. That they will deploy all available tools – including legal ones – to defend their interests is perfectly predictable.

Stephens’ final category focuses on the non-compliance procedure of the Kyoto Protocol, which he labels “*administrative* in character because it is concerned fundamentally with upholding the implementation of the international climate regimes”.<sup>35</sup> The characterization is not obvious – it is not clear why the Kyoto Protocol’s NCP does not fall within the ‘progressive’ camp. After all, assuming it works as designed, the NCP compels parties to adopt procedures and policies that advance the goals of the international regime. Alternatively, in the unlikely event that it were to operate in a more perverse fashion and come to be characterized by inaction or excessive deference to non-compliant parties, the ‘regressive’ label might be more apt. In any event, the third category seems to attribute a non-valency to an activity (administrative compliance) that appears perfectly capable of bearing one.

#### IV. A TYPOLOGY FOR CLIMATE CHANGE LITIGATION<sup>36</sup>

The opportunity thus arises for an approach to climate change litigation capable of understanding and systematically analysing the plethora of cases that have and will continue to fall under the rubric of ‘climate change litigation’, understood as legal challenges which implicate climate change policy and norms. The literature referred to above and the voluminous articles and books that constitute it, may be bewildering; it has a tendency to compartmentalize the discussion into

<sup>32</sup> Supra note 2, with reference made to H Van Asselt, F Sindico and MA Mehling, *Global Climate Change and the Fragmentation of International Law* 30 Law and Policy 423 (2008).

<sup>33</sup> In particular at the ‘Informal Trade Ministers Dialogue’ at COP 13 in Bali, December 2007.

<sup>34</sup> R Garnaut, The Garnaut Climate Change Review: Final Report 232-234 (2008).

<sup>35</sup> Supra note 2, emphasis added.

<sup>36</sup> This section draws on D Collier, J Laporte, J Seawright, *Typologies: Forming Concepts and Creating Categorical Variables*, in *The Oxford Handbook of Political Methodology* (JM Box-Steffensmeier, HE Brady and D Collier, eds., 2008).

categories of level,<sup>37</sup> or particular mechanisms,<sup>38</sup> or groupings of jurisdiction without explicating the basis for the grouping.<sup>39</sup> What is lacking is an approach that unites the case law in a way that is collectively exhaustive whilst simultaneously enabling mutually exclusive categories to be drawn.

By asking ‘What and Why and When And How and Where and Who’ of the caselaw, the current argument seeks to reveal both the context of climate change litigation and the motivations of those seeking legal recourse within a methodology that exhaustively captures the ‘data set’ of all climate change cases. I do so through a two-by-two matrix (Figure 1) that distributes the case law into nominal<sup>40</sup> categories that are mutually exclusive of one another within the overarching concept of the who, why, and when of climate change litigation. The different ‘types’ of litigation are then labelled to give conceptual meaning to their positions in relation to the row and column variables. The basic variables are concerned with (1) the nature of the climate change regulatory regime in given jurisdictions where litigation is commenced and (2) the environmental consequences of the action. The former variable is divided into ‘dedicated’ and ‘non-dedicated’ regimes to generate the rows of a matrix; the latter into ‘positive’ and ‘negative’ to generate its columns.

[INSERT FIGURE 1 ABOUT HERE]

# 1. ‘Climate Change Regimes’ – Dedicated and Non-Dedicated

The distinction between non-dedicated and dedicated climate change legal regimes is between jurisdictions that deploy ‘ordinary’, ‘general’ environmental or other categories of law to address (to the extent that they do) climate change and those that are avowedly, designedly and comprehensively for that purpose. In the former case those seeking to launch climate change actions often deploy legal tools from an area of the law that exhibits a family resemblance to climate change law, pertaining perhaps to a previous environmental regime relating to the general regulation of atmospheric pollution, and use it in lieu of a dedicated legal instrument that seeks to limit emissions of greenhouse gases. The familiar *Massachusetts v. EPA*<sup>41</sup> is such a case. The Clean Air Act of 1970, originally designed to address the public health impacts of petrochemical smog and administered and enforced by the Environmental Protection Agency, has undergone a series of amendments,<sup>42</sup> mostly notably those of 1990, which added major new titles, including acid rain (and the famous SO<sub>x</sub>/NO<sub>x</sub> trading schemes), CFC destruction of the ozone layer, and indoor air quality. Both stationary and mobile sources are regulated. What was not plainly within the ambit of the regime was the regulation of the greenhouse gases covered by the UNFCCC. A range of voluntary programmes to address stationary sources of CO<sub>2</sub> were initiated by Presidents Bush (Senior and Junior) and Clinton, but federal action creating binding obligations or mechanisms by which greenhouse gases would be reduced were (and at the time of writing, still are) absent.<sup>43</sup> This lacuna inevitably raised the question of whether the Clean Air Act provides a legal basis for the regulation of CO<sub>2</sub>. The answer given to this question in August 2003 by the EPA’s General Counsel, Robert A. Fabricant, is ‘no’:

<sup>37</sup> Such as international or EU law – Birnie, Boyle & Redgwell supra note 14 and Ghaleigh supra note 5, respectively.

<sup>38</sup> Such as the EU ETS or Kyoto flexibility mechanisms, again, see Ghaleigh supra note 5 and Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work (D Freestone & C Streck, eds., 2005), respectively.

<sup>39</sup> Such as Adjudicating Climate Change: State, National, and International Approaches (WCG Burns and HM Osofsky, eds., 2009).

<sup>40</sup> The categories are nominal, not ordinal, in the sense that they do not or need not form a scale that measures greater or lesser values or ‘degrees’ of litigation.

<sup>41</sup> 127 S. Ct. 1438 (2007).

<sup>42</sup> See generally, AW Reitze, *The Legislative History of US Air Pollution Control*, 36 Houston Law Review 679 (1999).

<sup>43</sup> NA Ashford & CC Caldart, *Environmental Law, Policy and Economics: Reclaiming the Environmental Agenda* 545-547 (2008).

An administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as global climate change, instead of searching for authority in an *existing statute that was not designed or enacted to deal with the issue* ... Because EPA lacks CAA regulatory authority to address global climate change, the term ‘air pollution’ as used in the regulatory provisions cannot be interpreted to encompass global climate change. Thus, CO<sub>2</sub> and other GHGs are not ‘agents’ of air pollution and do not satisfy the [act’s] definition of ‘air pollutant’. [Further, Congress] was well aware of the global climate change issue when it last comprehensively amended the [Clean Air Act] in 1990.<sup>44</sup>

The EPA’s subsequent denial of a petition from a variety of environmental groups that it regulate greenhouse gas emissions from motor vehicles was swiftly followed by petitions to the Washington D.C. Circuit court, challenging the EPA’s administrative decision. The initially disappointed groups were joined by several of the US states, major metropolitan areas, and advocacy groups.<sup>45</sup> All argued that the EPA was obliged by section 202(a)(1) of the Clean Air Act<sup>46</sup> to address CO<sub>2</sub> tailpipe emissions. Unsuccessful before the D.C. Circuit, the appeal to the Supreme Court yielded, in 2007, a now famous result.<sup>47</sup> Full accounts of the decision proliferate and will not be repeated here.<sup>48</sup> Suffice to note that the Court was not deflected from intervening by the alleged absence of a justiciable controversy and the presence of a ‘political question’ – “The parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court.”<sup>49</sup> Nor was the question of standing a bar to relief:

We stress here ... the special position and interest of Massachusetts. It is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in [previous cases] a private individual ... That Massachusetts does in fact own a great deal of the “territory alleged to be affected” only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.<sup>50</sup>

The central question, as the Court saw it, was whether the Act could be read as authorizing the regulation of greenhouse gas emissions from new vehicles by the EPA if it ‘judged’ that such emissions contributed to climate change. Greenhouse gas emissions do, says Justice Stephens, “fit well within the Clean Air Act’s capacious definition of ‘air pollutant’”<sup>51</sup> – as such, they can be regulated by the EPA. The key point is that the Court demonstrated a willingness to intervene despite EPA claims that “curtailing motor-vehicle emissions would reflect ‘an inefficient, piecemeal approach to address the climate change issue.’”<sup>52</sup> Nor was the Court deterred by the dissenters’ charge that their reasoning gave succour to applicants “apparently dissatisfied with the pace of progress on this issue in the elected branches,”<sup>53</sup> or that “no matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency.”<sup>54</sup>

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<sup>44</sup> Ibid., at 546. Emphasis added.

<sup>45</sup> The EPA itself was supported by ten intervening states and six trade associations.

<sup>46</sup> As interpreted in *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (C.A.D.C. 1976) (en banc), s.202(a)(1) “and common sense...demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.” The Clean Air Act was subsequently amended in 1977 to reflect this more ‘precautionary approach’.

<sup>47</sup> Supra note 41.

<sup>48</sup> See *inter alia* J Zasloff, *Massachusetts v. EPA* 102 Am. J. Intl. L. 134-143 (2008).

<sup>49</sup> Supra note 41 at 516, per Justice Stephens.

<sup>50</sup> Ibid., at 519.

<sup>51</sup> Ibid., at 532.

<sup>52</sup> Ibid., at 533.

<sup>53</sup> Ibid., at 535, per Chief Justice Roberts.

<sup>54</sup> Ibid., at 560, per Justice Scalia.

The presence of a regulatory regime not designed for climate change mitigation or adaptation can thus be re-purposed to do precisely that, given a suitably minded court. The Clean Air Act, as amended, is certainly not a dedicated climate change regime – the dissenting minority’s characterization of it as ‘piecemeal’ cannot be gainsaid – but, post-*Massachusetts* it has become a climate change regime of sorts. It grants legal authority to an administrative agency to regulate greenhouse gas emissions, which was duly taken up in April 2009 when the EPA signed a proposed endangerment finding for greenhouse gases under section 202(a) of the Clean Air Act. The subsequent consultation period generated a rather remarkable 380,000 public comments, and in December 2009 the EPA signed an ‘endangerment’ finding (that greenhouse gases in the atmosphere threaten public health and welfare) and a ‘cause and contribute’ finding (that new motor vehicles and engines cause or contribute to greenhouse gases). These findings do not impose emission-reduction commitments but are necessary precursors to the agency’s ‘proposed greenhouse gas emissions standards for light-duty vehicles’.<sup>55</sup>

In the methodology herein, such a ‘non-dedicated’ regime is to be contrasted with those which are designed specifically and avowedly for the purposes of addressing anthropogenic climate change. Although examples proliferate, the EU’s enthusiastic embrace of policy to combat climate change has generated a climate change regime that matches any in terms of its sophistication and maturity. The EU’s approach to the problematic has both external and internal legal dimensions, though only the latter are considered at any length here.<sup>56</sup> It is of course the case that the relationship between internal and external policy is closely linked, with the EU taking the view that it can determine global negotiations most effectively by demonstrating comprehensive and innovative action within its borders.<sup>57</sup> The focal point of the EU’s ‘integrated approach’ to climate and energy policy was completed in June 2009 when four complementary legislative instruments were concluded in the form of the ‘climate and energy package’. The revised emissions trading scheme is at the heart of the package,<sup>58</sup> and is supplemented by an ‘effort-sharing scheme’, which aims to reduce greenhouse gas emissions from sectors not covered by the EU ETS<sup>59</sup> through binding national targets for renewable energy<sup>60</sup> and a legal framework to promote the development of carbon capture and storage.<sup>61</sup> These instruments provide the legal pathway for the EU member states to collectively reduce the EU’s greenhouse gas emissions by at least 20 per cent by 2020 (against a 1990 baseline), to ensure that at least 20 per cent of the EU’s energy consumption is met from renewable sources,

<sup>55</sup> See <http://www.epa.gov/oms/climate/regulations.htm> (accessed 3 March 2010).

<sup>56</sup> The Copenhagen COP has long been the focus of the EU’s ‘external’ climate change policy. For the European Commission’s statement of the EU’s ambitions at the COP see Commission Communication, Towards a Comprehensive Climate Change Agreement in Copenhagen, COM (2009) 39, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0039:FIN:EN:PDF>. On the broader ambitions of the EU’s global policy, see M Mehling & L Massai, *The EU and Climate Change: Leading the Way towards a Post-2012 Regime?* 1 Climate and Carbon Law Review 45 (2007), and for a post-COP update, J Curtin, *The Copenhagen Conference: How Should the EU Respond?*, Institute of International and European Affairs, January 2010, available online at: <http://www.iiea.com/documents/the-copenhagen-conference-how-should-the-eu-respond>

<sup>57</sup> Commission Communication, 20 20 by 2020 – Europe’s Climate Change Opportunity, COM (2008) 30, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0030:FIN:EN:PDF>

<sup>58</sup> Council Directive 2009/29/EC, Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading Scheme of the Community, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:0087:en:PDF>

<sup>59</sup> Council Decision 406/2009/EC, The Effort of Member States to Reduce Their Greenhouse Gas Emissions to Meet the Community’s Greenhouse Gas Emission Reduction Commitments up to 2020, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0136:0148:EN:PDF>

<sup>60</sup> Council Directive 2009/28/EC, Promotion of the Use of Energy from Renewable Sources and Amending and Subsequently Repealing Directives 2001/77/EC and 2003/30/EC, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0016:0062:EN:PDF>

<sup>61</sup> Council Directive 2009/31/EC, The Geological Storage of Carbon Dioxide and Amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0114:0135:EN:PDF>

and to reduce primary energy use by 20 per cent (compared with projected levels) by energy efficiency measures.

Whether these targets are likely to be achieved or not, and whatever the policy's impacts on competitiveness and energy security, this is, at present, the apogee of a dedicated climate change regime. It provides a contrasting variable to the accompanying variable in Figure 1 of 'non-dedicated regimes', as typified by the situation in the US, and is thus a forum for litigation with a radically different regulatory ecosystem.

## 2. 'Environmental Consequences' – Positive and Negative

Building on the account of the variables contained in the rows, those in the columns can be dealt with summarily. When considering litigation in either kind of regulatory regime, it will be possible to characterize the environmental consequences of the tribunal's decision as either negative or positive. It will invariably be the case that the outcome of a decision will be for emission reductions not to be made ('negative') or to be made ('positive').<sup>62</sup>

Accordingly, to return to *Massachusetts v. EPA*, the plaintiffs' claim can be soundly characterized as having environmental consequences that are 'positive' insofar as they sought to compel the EPA to regulate tailpipe emissions and thereby reduce them. By contrast, a recently filed petition for review<sup>63</sup> against the EPA's aforementioned joint findings of December 2009,<sup>64</sup> brought by a coalition of mining, energy, and agricultural companies and related trade associations, seeks to enjoin the EPA to make findings which would have the effect of increasing tailpipe emissions (or not allowing them to be reduced). Whatever the outcome of this particular challenge, the narrative of *Massachusetts v. EPA* is one not unfamiliar to US environmental lawyers. Indeed, it is readily accommodated by the 'catalyst theory', in which citizen suits are brought to enforce environmental statutes or regulations against private parties or the government, with a legislative solution then following.<sup>65</sup> The departures in the instant case from this approach are twofold – the non-legislative regulatory steps being taken by the EPA are currently a matter of legal challenge and more pertinently from a global perspective, the fact of gridlocked Congressional-Presidential relations and stretched Presidential attention make the prospects of legislation on climate change dim. The rate of the chemical reaction is not certain to increase.

## V. APPLICATION AND 'CATEGORICAL VARIABLES'

The cross-tabulation of the row variable of 'climate change regimes' with the column variable of 'environmental consequences' forms a matrix for an overarching concept of climate change litigation – see Figure 2. Generated in each of the four cells is a different kind of litigation, each labelled as a 'type' that aims to give conceptual meaning to each cell, corresponding to its position in relation to the row and column variables.

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<sup>62</sup> By way of a rider, it is accepted that using the term 'positive environmental consequences' as a proxy for 'outcomes that positively contribute to climate change mitigation and adaptation' may, at the margins, be contentious. 'Environmental' consequences are evidently broader than 'climate change' consequences, which in turn are broader than mere emission reductions. Considerations such as sustainable development, human rights, the rights of indigenous peoples, and many others require attention.

<sup>63</sup> *Coalition for Responsible Regulation, Inc., et al. v. United States Environmental Protection Agency*, No. 09-1322 (D.C. Cir. December 23, 2009), U.S. Court of Appeals for the D.C. Circuit.

<sup>64</sup> See *supra* note 55 and the attendant discussion.

<sup>65</sup> A key feature of the 'catalyst theory' is that parties who have not succeeded in court may nonetheless be awarded their fees or costs if they can demonstrate that their actions has 'catalysed' regulatory reform, although this feature of US civil litigation system seems to have been substantially eroded by the Supreme Court's decision in *Buckhannon Board and Care Home Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001).

[INSERT FIGURE 2 ABOUT HERE]

1. Defensive Litigation – *Every one that was in distress and every one that was discontented*<sup>66</sup>

The four types – defensive, promotive, challenging, and perfecting – are the consequences of certain configurations of the litigation variables. Thus, litigation that occurs in jurisdictions that are without a dedicated regulatory regime for climate change (such as the US or Australia), and is negative in respect of its environmental consequences, is characterized as ‘defensive’ in that it defends the status quo of a regulatory vacuum. The ongoing (as of March 2010) case of *Coalition for Responsible Regulation, Inc., et al. v. United States Environmental Protection Agency* falls into this category – no sooner had the EPA published its finding that greenhouse gases endanger public health and welfare, thereby triggering the Clean Air Act jurisdiction to regulate such emissions, than a petition for review challenging the action was filed with the D.C. Court of Appeals. The challengers’ motivation in this ‘type’ is explored further below, but it suffices for present purposes to note that the overall aim is to limit the ‘regulatory activism’ of the court by way of a more deferential approach to agency decision-making, as advocated by the dissent in *Massachusetts v. EPA* (Justice Scalia especially).

In quantitative terms though, defensive climate change litigation is uncommon for readily available reasons. Those seeking negative environmental outcomes in jurisdictions without dedicated climate change regimes will, in most cases, already have what they wish in the form of the absence of a regulatory framework. Only rarely, as in *Coalition for Responsible Regulation*, will the need arise for such Adullamites to seek to reverse a gain. Moreover, the number of jurisdictions which can be classified as ‘non-dedicated’ is reducing over time, as an increasing number of polities (both developed and developing) engage in the process of regulating climate change, even if the rate of so doing disappoints. It is a matter of speculation whether ‘defensive’ litigation will thus become an increasingly endangered species or feature more prominently as a part of strategies to maintain an antediluvian body of law. If, as has occurred in several American states in early 2010, there is a movement against polities having ‘dedicated’ regulation, an acceleration of defensive litigation can be anticipated.

2. Promotive Litigation

By contrast, the ‘promotive’ cell is well populated. *Massachusetts v. EPA* is very much the archetype of litigation in a non-dedicated climate change regime where applicants are seeking to deploy more general legal norms which have no necessary climate change characteristics in ways that can promote positive environmental outcomes by way of regulatory intervention sanctioned or even required by courts. Where the channels of political change are blocked, as they were in climate change terms during the Bush Jr presidency, recourse to reform via the courts is strongly incentivized. Further instances of such cases are referred to in recent works, such as *Adjudicating Climate Change: State, National and International Approaches*.<sup>67</sup> Detailed at each of the subtitle’s three levels are proceedings in which courts have engaged in often complex processes that have driven regulatory action in sometimes surprising ways when traditional suppliers of such regulation have failed to do so. Thus, in the contested proceedings of *In the Matter of Quantification of Environmental Costs*,<sup>68</sup> the findings of a Minnesota administrative court judge, that cost-valuations

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<sup>66</sup> “David therefore departed thence, and escaped to the cave Adullam: and when his brethren and all his father’s house heard it, they went down thither to him. And every one that was in distress, and every one that was in debt, and every one that was discontented, gathered themselves unto him; and he became a captain over them: and there were with him about four hundred men.” 1 Samuel 22.

<sup>67</sup> (WCG Burns and HM Osofsky, eds., 2009).

<sup>68</sup> S Stern, *State Action As Political Voice in Climate Change Policy*, in Burns & Osofsky *ibid*.

for CO<sub>2</sub> emissions be at a relatively high range, were adopted by the relevant administrative body, subjected to Court of Appeals challenges, and there upheld. As noted by Stern,

The federal government's reluctance to create national legislation or ratify the Kyoto Protocol under the Bush administration gave states latitude to create their own climate change initiatives. States frequently responded by enacting weak or symbolic regulation that lacks regulatory bite ... The cost value regulation and subsequent litigation fostered political voice and expressed dissatisfaction with federal and international climate change policy.<sup>69</sup>

The idea of litigation operating as an 'expressive demand' is, we will recall, perfectly consistent with the ideal type of the legal mobilization literature discussed in Part III above. As Zeman noted, "the law is ... mobilized when a desire or a want is translated into a demand as an assertion of rights". As with the *Quantification of Environmental Costs*, so with the important Australian case of *Australian Conservation Foundation v. Latrobe City Council*.<sup>70</sup> Often known as 'Hazelwood', after the large and expanding coal mine at issue, the case revolved around the question of whether the planning agency charged with conducting the environmental impact assessment for the expansion of the facility had erred in not considering the environmental impacts of the greenhouse gas emissions associated with the proposed project. The question was answered in the affirmative, establishing the valuable precedent that government agencies had to consider the implications of emissions from burning coal as part of approving a mining project. Further, and in a manner consistent with the notion of promotive litigation, McAllister argues that,

in the absence of such alternative policies ... litigation is a critical mechanism by which citizens can force their governments to take climate change seriously ... By its nature, project-based assessment of climate change impacts may not be able to address the problems of climate change holistically, but legal decisions ... may well play an important role in leading reluctant governments and industries towards developing policies that can.<sup>71</sup>

A shift from administrative, planning and tort<sup>72</sup> law to the less certain terrain of the international human rights/environmental law nexus, and a shift from the developed to the developing world, gives rise to a final instance of promotive litigation.<sup>73</sup> *Gbemre v. Shell Petroleum Development Co.* arose from the oft-questioned practice of gas flaring, in which natural gas released during oil extraction is burnt off, producing globally significant quantities of greenhouse gases and locally damaging heat, noise, and particulate pollution. The applicant, who was acting also on behalf of the Iwherekan community, argued that the flaring activities of Shell and others had violated certain of their rights, as guaranteed by national constitutional law<sup>74</sup> and regional human rights

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<sup>69</sup> Ibid., at pp 46-47.

<sup>70</sup> LK McAllister, *Litigating Climate Change at the Coal Mine*, in Burns & Osofsky supra note 66.

<sup>71</sup> Ibid, p.71

<sup>72</sup> Although space precludes a fuller discussion, it is important to note recent nuisance actions in the US in which private parties have successfully expanding the standing rules pioneered in *Massachusetts v. EPA*, have sued major GHG emitters for interfering in the applicant's use or enjoyment of their property (*Connecticut v. American Electric Power Corp et al.*, 582 F. 3d. 309 (2<sup>nd</sup> Cir., 2009)). A more radical decision was handed down in *Comer v. Murphy Oil*, 585 F.3d 855 (5<sup>th</sup> Cir. Miss. 2009) in which the applicants, a group of Hurricane Katrina survivors, successfully sought punitive damages in a nuisance action on the basis that the defendant's emissions had exacerbating the strength of the storm. See further, D Freestone & D Frenkil, *Emissions Trading in the US: A New Regime Approaching?* VII *European Energy Law Report* 75-94 (2010).

<sup>73</sup> A Sinden, *An Emerging Human Right to Security from Climate Change: The Case Against Gas Flaring in Nigeria*, in Burns & Osofsky supra note 66.

<sup>74</sup> Constitution of the Federal Republic of Nigeria (1999): Article 33(1) "every person has a right to life, and no one shall be deprived intentionally of his life"; Article 34(1) "every individual is entitled to respect for the dignity of his person".



law.<sup>75</sup> Beyond making serious claims as to gas flaring causing illness, disease, acid rain and crop failure, “perhaps most interestingly, plaintiffs also cite[d] the contribution to gas flaring to climate change as a basis for their constitutional and human rights claims.”<sup>76</sup>

The eventual finding of the Federal High Court of Nigeria in favour of Mr Gbemre was preceded by an extended and presumably costly procedural battle.<sup>77</sup> Nonetheless, the Court decided on 14 November 2005 that held that gas flaring was indeed a “gross violation” of the constitutionally-guaranteed rights to life and dignity which included the right to a “clean poison-free, pollution-free healthy environment”. The Court ordered Shell to stop flaring in the Iwherekan community immediately and declared the national law permitting gas flaring laws to be “unconstitutional, null and void”. The Attorney General of Nigeria was ordered to meet with the Federal Executive Council to set in motion the necessary processes for new gas flaring legislation consistent with the constitution.<sup>78</sup> Despite this favourable finding at trial, the subsequent history of this case is one of inaction on the part of Shell, appeals and apparent non-compliance with court orders.<sup>79</sup> Whatever the ultimate outcome of Gbemre, the case has made significant ‘promotive’ gains on two fronts. Domestically, the applicant succeeded in drawing executive and legislative attention to the constitutional and health effects of gas flaring. Whether the trial court’s order is upheld or not, the issue is now squarely a matter of national public debate. Relatedly, in the international realm the case has obviously been something of a cause célèbre in the environmental and human rights communities of scholars,<sup>80</sup> activists<sup>81</sup> and practitioners.<sup>82</sup> Litigation has here played a role, perhaps *the key* role, in mobilizing the shift towards a regime of law that whilst not “dedicated”, is at least attentive to the norms of climate change law.

### 3. Boundary-Testing Litigation

In shifting up to dedicated regimes of climate change regulation, the opportunity structures for litigation are substantially changed. In turn we might anticipate a change in the actors and their motivations. At the intersection of dedicated regimes and negative environmental consequences is the categorical type of ‘boundary-testing’ litigation. As with the promotive cell, this is a well-populated, albeit that the focus in the analysis below is on a single legal instrument, the EU Emissions Trading Scheme (EU ETS).<sup>83</sup> Litigation of this type is distinct from that discussed in the previous section in that it is not ‘promoting’ or advocating the enactment of regulations or legislation to address climate change – for that is already present in a ‘dedicated’ regime. But litigation in this cell does have the character of seeking to establish, or test, the limits of the regulatory regime. What are the *precise* rules of the scheme the regulation seeks to establish? Is the scheme itself legally

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<sup>75</sup> African Charter on Human and Peoples’ Rights (2004): Article 4 “Every human being shall be entitled to respect for his life and the integrity of his person”; Article 16 “(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) State Parties to the present Charter shall take the necessary measures to protect the health of their people”; Article 24 “All peoples shall have the right to a general satisfactory environment favourable to their development”.

<sup>76</sup> Supra note 73 at 179.

<sup>77</sup> Ibid.

<sup>78</sup> The judgment is available at [www.climatelaw.org/media/media/gas.flaring.suit.nov2005/-ni.shell.nov05.judgment.pdf](http://www.climatelaw.org/media/media/gas.flaring.suit.nov2005/-ni.shell.nov05.judgment.pdf)

<sup>79</sup> Supra note 73 at 180-181.

<sup>80</sup> Ibid.

<sup>81</sup> E.g. Friends of the Earth UK, Press Release, *Shell Fails to Obey Gas Flaring Court Order*, 2 May 2007.

<sup>82</sup> Climate Justice Programme: <http://www.climatelaw.org/cases/country/nigeria/gasflares/>

<sup>83</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC amended by: Directive 2004/101/EC of 27 October 2004 L 338 18 13.11.2004, Directive 2008/101/EC of 19 November 2008 L 8 3 13.1.2009, Regulation (EC) No 219/2009 of 11 March 2009 L 87 109 31.3.2009, Directive 2009/29/EC of 23 April 2009 L 140 63 5.6.200. Hereinafter ‘EU ETS’, ‘the Directive’ or ‘the Scheme’.

competent?<sup>84</sup> Is the scheme being implemented in an appropriate manner by those subject to it, and with rights and duties under it? Is the scheme consistent with norms of constitutional law?<sup>85</sup> Such issues might, generously, be described as clarificatory,<sup>86</sup> but as we shall see that term fails to account for the motivations of some plaintiffs who seek the recourse of the law to defend their economic interests, often at the cost of constrained emission reductions. Above all, this litigation is characterized by its technocratic bent and the absence of any ancillary appeals broader public sentiment. To the extent that the support of publics is sought, their engagement is substantially de-radicalized.

The EU has invested considerable political energy in constructing a legal regime for addressing climate change; its Climate and Energy Package is described by the World Bank as “the most concrete of [the] national, regional and international actions on climate change.”<sup>87</sup> Whilst it is an open question whether the complex and comprehensive arrangements of the EU have had the desired effect in terms of strengthening the EU’s hand in international climate change negotiations, there can be no doubt that the edifice’s foundation, the EU ETS,<sup>88</sup> is a regulatory instrument of global dimensions, and within the sphere of the global carbon market it is very much the eight-hundred-pound gorilla. The EU ETS’s share of the global carbon market in 2008 was approximately \$92 billion, from a total transacted value of \$126 billion, representing annual growth of 87 per cent. This figure is “accounted for by transactions of allowances and derivatives under the [EU ETS] for compliance, risk management, arbitrage, raising cash and profit-taking purposes.” The second largest element of the market is the secondary market for CERs, whose transactions for 2008 amounted to \$26 billion.<sup>89</sup> As I have noted elsewhere,

The EU ETS’s trading volumes dwarf those of its rivals – the voluntary Chicago Climate Exchange, the New South Wales ETS, the New Zealand ETS and the fledgling Japanese scheme – none of which has a volume equal to even 1% of the EU ETS. The Scheme’s position of primacy will remain unchallenged unless and until a federal US scheme is established.<sup>90</sup>

At the time of the current writing, a US federal scheme again seems a dim prospect.<sup>91</sup> True though it is that “35 of the 50 states of the Union are already participating in some way in the three regional GHG reduction schemes”<sup>92</sup>, none reduce emissions even close to the levels achieved by the EU ETS nor can any EPA non-legislative scheme, which is emerging as the likeliest option.

The regulatory ambit of the EU ETS is similarly significant, encompassing as it does 40 per cent of the EU’s total greenhouse gas emissions, which represent approximately 11,000 of the EU’s largest emitting industrial installations. For the period 2008-12 the scheme is estimated to effect emissions reductions of 3.3 per cent (139 Mt CO<sub>2</sub> p.a.) from the base year of 1990 in the EU-15.<sup>93</sup> Details of

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<sup>84</sup> This question arose in the context of the US Regional Greenhouse Gas Initiative (RGGI) when a power generator, *Indeck Energy Services Inc.*, challenged the legal authority of New York state to impose the RGGI scheme without legislative action. Settlement was reached in December 2009. See Freestone & Frenkil supra note 72.

<sup>85</sup> Considered below in respect of the EU ETS, such questions are explored by Freestone & Frenkil, *ibid.*, with reference to both the Western Climate Initiative and Midwestern Greenhouse Gas Reduction Accord and their compatibility with the US Constitution’s ‘Commerce Clause’, Article I, section 8, Clause 3.

<sup>86</sup> JAW van Zeven, *The European Emissions Trading Scheme Case Law*, 18(2) RECIEL 119, at 127 (2009).

<sup>87</sup> World Bank, *State and Trends of the Carbon Market 2009* 1 (2009).

<sup>88</sup> *Ibid.*, note 83. See also the summary at JH Jans & HHB Vedder, *European Environmental Law* 385-388 (2008).

<sup>89</sup> Supra note 86.

<sup>90</sup> Supra note 5. The analysis of the Community Courts’ caselaw relating to the EU ETS therein is built on and extended in the present section.

<sup>91</sup> For an account of the various bills under consideration, see Freestone & Frenkil *op cit* n. 72.

<sup>92</sup> *Ibid.*, at 93.

<sup>93</sup> European Environment Agency, *Greenhouse Gas Emission Trends and Projections in Europe 2008: Tracking Progress Towards Kyoto Targets*, EEA Report 5/2008, 7.

the scheme, its legislative prehistory, legal structure, system of allowances and allocation, and various iterations, are discussed elsewhere.<sup>94</sup>

Of the various notable features of the EU ETS, from the perspective of lawyers, the sheer volume of litigation before the Community Courts that has arisen in respect of the Directive is remarkable. The EU ETS Directive has generated 43 proceedings before the Community Courts.<sup>95</sup> That number includes procedural actions as well as full judgments and which remain pending. They fall into four categories: challenges to the validity of the Directive; Article 226 of the Treaty Establishing the European Community (hereinafter ‘EC’) infringement proceedings;<sup>96</sup> Article 230 EC<sup>97</sup> challenges to Commission decisions on the ‘national allocation plans’ in Phase I and Phase II; and a category of miscellaneous cases. On the notion of ‘Community Courts’, for those not familiar with EU law it should be recalled that the uniform application of Community law requires a Community court system, to wit, the European Court of Justice and its inferior court, the Court of First Instance, which consist of judges from the twenty-seven Member States. The former is the highest judicial authority in the matter of Community law; pursuant to Article 220 EC,<sup>98</sup> it is tasked to “ensure that in the interpretation of [the] Treaty the law is observed.” This entails inter alia monitoring the application of Community law both by Community institutions when implementing the Treaties<sup>99</sup> and by Member States and individuals in relation to their obligations under Community law.<sup>100</sup>

Before engaging in the substance of those actions brought before the Community Courts, it is worth first considering how the case law generated by the EU ETS before the Community Courts compares with that generated by other Community environmental legal instruments. To determine the relevant comparators to the EU ETS, the approach of J. Jans and H. H. B. Vedder’s *European Environmental Law* is followed.<sup>101</sup> This leading treatment, European Community environmental law maps twenty-six substantive areas of policy (from environmental impact assessments to environmental governance, eco-labeling, flood risk, emissions into the air, waste, transfrontier shipments of waste, wild birds, and climate change) which are addressed in seventy-four separate legal instruments. By comparing the total and per annum number of Community Court cases involving these environmental instruments and those relating to the EU ETS, we are given an indication of the exceptional nature of the EU ETS in Community law. For ease of representation

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<sup>94</sup> Supra note 5.

<sup>95</sup> These figures are arrived at by searching the Court’s official case database – <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> – for the precise citation of the legal instrument. As at 04/03/2010 “2003/87/EC” returned 100 hits, which when ‘cleaned’ to avoid double counting of procedural steps in a single action, arrives at 43 actual actions.

<sup>96</sup> “If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.”

<sup>97</sup> “The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council [and] of the Commission ... It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers ... Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of *direct and individual concern* to the former.” Emphasis added.

<sup>98</sup> “The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.”

<sup>99</sup> The European Union is based on the rule of law in the sense that its legal powers and duties are derived from various treaties which are agreed by all Member States. These treaties include the Treaty of Rome aka EC Treaty (1957), the Single European Act (1987), the Treaty on European Union (1992) and the Lisbon Treaty (2009). The Lisbon Treaty entered into force on 1 December 2009 and makes numerous amendments to the previous arrangements, discussion of which is outwith the scope of this article.

<sup>100</sup> P Craig & G de Búrca, *EU Law: Text, Cases and Materials* 66-76 (2008) and EC Treaty Article 220, 226-245 and Treaty on European Union Article 46.

<sup>101</sup> Supra note 88 at pp x – xii, 305 – 467.

herein however, those instruments that have been the subject of legal challenge fewer than five times have been excluded from Table 1 below.

[INSERT TABLE 1 ABOUT HERE]

The contents of the first column of table 1, being the relevant legal instruments of EU environmental law, are selected by the method described above. The second column, identifying the number of actions pertaining to each instrument is arrived at by searching the EU ‘fingertips’ database<sup>102</sup> to find the case law on the individual Community instruments. This database searches the Courts’ official database, EUR-Lex, directly and brings up cases in which the relevant instrument was ruled on by the Court – the database heading reads ‘affected by case’. To ensure comprehensive coverage, results were cross-checked with those from a general search on the legislation in the ‘words in the text’ field in the ECJ case law database.<sup>103</sup> This latter search includes all references to the instrument, including cases in which the instrument was only mentioned and not ruled on directly. Column 3, ‘Years in Force’, counts years to 2010, not from the year of promulgation but from the date of transposition.<sup>104</sup> This accounts for some of the apparently brief periods of law in force in some cases. For example, the Environmental Liability Directive was promulgated in 2004 but had a deadline of transposition of 30 April 2007. In other cases, such as the Freedom of Access to Information on the Environment Directive of 1990, the number in the ‘Year in Force’ cell reflects the fact of a transposition deadline of 31 December 1992 and subsequent repeal on 14 February 2005.

Column 4, ‘Actions per annum’ (by which the table is sorted), contains the key findings marking out the EU ETS from the corpus of EU environmental law. Firstly, the number of cases brought before the Community Courts pertaining to the EU ETS Directive is very high in comparison with all other instruments of EU environmental law. Of the seventy-four instruments surveyed herein, in terms of *frequency of challenge*, the EU ETS, with 43 actions, ranks second only to the Waste Directive (59 actions). More significantly however, when these figures are scrutinized on an annualized basis to reflect *intensity of challenge*, the EU ETS is an extraordinary outlier in the case law for attracting over seven challenges per year in its short life. The next most frequently litigated instrument in EU environmental law is the Environmental Liability Directive with 2.3 actions per annum, but with only seven actions for the latter, the possibility of statistical skewing is present. The Waste Directive has more robust data, but at a rate of only two challenges per year, it is obviously the case that across the entirety of EU environmental law the ETS has attracted a unique quantity of challenges. How do we explain this, not only within the context of EU environmental law but also as a subset of climate change litigation?

The challenges to the EU ETS fall into four categories of which the ‘miscellaneous cases’ can be disregarded as they concern EIAs and tendering and do not implicate the EU ETS directly.<sup>105</sup> Similarly marginal are the two infringement proceedings successfully brought by the Commission under Article 226 EC, establishing that Member States had failed to fulfil their obligations under the Directive owing to Finland and Italy’s non-transposition or incomplete transposition of the Directive within deadline prescribed in Article 31 of the Directive.<sup>106</sup> The balance of the cases relate to (1) challenges to Commission decisions on the ‘National Allocation Plans’, pursuant to

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<sup>102</sup> <http://www.amicuria.eu/service/cx3-de.htm>

<sup>103</sup> <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

<sup>104</sup> In the argot of Community law, ‘transposition’ is the process whereby legal instruments known as ‘Directives’ enacted at the Community level are required to be implemented domestically by Member States, within a timetable determined by the Community legislator.

<sup>105</sup> *Abraham and Others v. Region Wallonne and Others* Case [2008] E.C.R. I-1197 and *Evropaiki Dynamiki v. Commission* Case [2008] E.C.R. II-247. See the discussion at supra note 5, p.385.

<sup>106</sup> *Commission v. Finland* [2006] E.C.R. I-10 and *Commission v. Italy* [2006] E.C.R. I-65.

Article 230 EC (essentially actions for annulment against illegal administrative decisions) and (2) challenges to the validity of the Directive (known as ‘preliminary references’ pursuant to Article 234). I have addressed these bodies of case law at some length elsewhere<sup>107</sup> and the following summary is deliberately brief to avoid repetition.

In the case of *Société Arcelor Atlantique*<sup>108</sup> the validity of the EU ETS was challenged following a reference for a preliminary ruling under Article 234 EC, initiated in the French Conseil d’État.<sup>109</sup> The applicant is the world’s largest volume producer of steel, and as such its primary argument is the predictable one that the Directive is discriminatory in its scope of application in that it excludes sectors in direct competition with steel producers such as installations producing aluminium and plastics. In its ruling the ECJ adopted a narrow interpretive approach addressing only the question of whether the Directive was compatible with the principle of equal treatment. That question was answered in the affirmative with reference to the exclusion of the plastics and aluminium sectors with respect to the included steel sector.

At the heart of the judgment lies the debate over justification of this differential treatment. Mindful that comparable situations may be differently treated by virtue of objective and reasonable criteria (proportionate and compatible with the aim of the legislation), the burden is on the Community institutions to (1) demonstrate the existence of a justification and (2) furnish the Court with information enabling it to verify the justification.

To this end the Community institutions submitting observations pointed to the novelty and complexity of the Trading Scheme and the provision for subsequent legislative review in support of its decision to limit the initial scheme to CO<sub>2</sub> and sectors making the most significant contribution to the overall emissions of that pollutant. The Court conducted its review on the basis of these considerations and reiterated its established general principles of judicial review that: (1) the EC legislator enjoys broad discretion in respect of political, economic, and social choices; (2) where these choices involve complex assessments and evaluations, the EC legislator may favour a ‘step-by-step’ approach to regulation; and (3) the EC legislator must take into account all the facts and technical or scientific data available at the time in reaching its decisions.<sup>110</sup> As applied to the Directive, the ECJ found that the preferred ‘step-by step’ approach was within the limits of the legislator’s discretion but that the legislator’s preferred incremental approach to Emission Trading does not release it from the demands of the principle of equal treatment (i.e. in deciding the order of inclusion in the Scheme, etc.). The justification for the exclusion of the aluminium sector was not considered in isolation. It was not simply a review of a cost-benefit analysis. The Court referred to the respective total emissions of both the aluminium and the steel sector: ‘The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may ... be regarded as justified’.<sup>111</sup>

In challenging the validity of the Directive, Arcelor was seeking an outcome – the voiding of the Directive – that can properly be described as having negative environmental consequences. In the absence of the Directive, not only are the emission reductions that it directly produces<sup>112</sup> lost, but the indirect effect such a finding would have on linked markets, such as that for CERs, would be

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<sup>107</sup> Supra note 5.

<sup>108</sup> *Société Arcelor Atlantique et Lorraine and Others v. Premier Ministre* [2008] E.C.R. I-9895.

<sup>109</sup> 8.02.2007 *Société ARCELOR Atlantique et Lorraine* No. 287110, p.55. For a discussion of the national law implications of this case - which have attracted much comment in France - see J-M Sauve, *Judging the Administration in France: Changes Ahead?* Public Law 531-545 (2008).

<sup>110</sup> Supra note 107 paras 57-59 *ibid* for authorities cited.

<sup>111</sup> *Ibid.*, para 72.

<sup>112</sup> Supra note 93.

considerable. Further, the character of the action falls squarely within the type of ‘boundary-testing’, as Arcelor sought to argue that the line-drawing exercise entered into by the European legislator (steel to be within the ambit of the scheme, but not aluminium or plastics) is invalid, not on its own terms but in accordance with the long established principles of ‘equal treatment’. Such an action can only exist in a jurisdiction which has a dedicated climate change regime, and as such regimes proliferate we can expect such actions to increase in number.

The second tranche of cases under the EU ETS is what, in national legal systems, would be described as challenges to administrative or judicial review actions, and these challenges to Commission decisions on NAPs form the largest part of the Courts’ EU ETS docket. An early case of this sort that has had considerable impact on the Courts’ jurisprudence in this area is *EnBW Energie Baden-Württemberg v. Commission*,<sup>113</sup> which arose from the disgruntled German power-station operator’s challenge to one of the specific ‘ex post’ transfer rules in the German NAP, under which an operator decommissioning an old power plant and replacing it with a (cleaner) new one may continue to enjoy the (larger) allowance it had in respect of the older plant for four years. The applicant argued that the transfer rule constituted illegal state aid and that its principal rival, RWE, would acquire, free of charge, excessive allowances under the transfer rule owing to its replacement of conventional installations. Those allowances it was free to sell on the market, conferring an unjustified competitive advantage on that operator. With several nuclear installations to decommission, the applicant operator would not benefit in a like manner. Its additional allowance was thereby capped.<sup>114</sup>

The Commission’s response was to raise a plea of inadmissibility,<sup>115</sup> with Germany intervening to support this plea. This was the first case to rule on the admissibility of Article 230 EC actions by individuals against Commission Decisions on NAPs pursuant to Article 9(3) of the Directive. The Court of First Instance found the application inadmissible for want of locus standi.

The concept of ‘direct concern’ for the purposes of Article 230(4) EC, as articulated in *EnBW Energie Baden Württemberg v. Commission*, is very much the orthodox position of the Court, though this is not to say that it is uncontroversial. The ECJ affirmed this very restrictive interpretation of ‘direct concern’ in *Unión de Pequeños Agricultores v. Council*.<sup>116</sup> In so doing, the ECJ rejected Advocate General Jacobs’ attempt to broaden standing, and in the subsequent case of *Jégo-Quéré*<sup>117</sup> the ECJ also, implicitly, overruled the CFI’s more cautious attempt to loosen the test. This remains a controversial area in general, with serious concerns over the adequacy of the Community system of legal protection.<sup>118</sup> Biernat has noted that Article 230(4)

imposes limits on the standing of individuals as it requires the applicant to be directly and individually concerned by the contested measure. This requirement, especially in case of individual concern, is very difficult to meet. However, it is the Court of Justice who interprets this provision in a severe manner ... Among many arguments one is especially often invoked and serves to justify Court’s unwillingness to relax the conditions for standing. This is the reluctance

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<sup>113</sup> [2007] E.C.R. II-1195.

<sup>114</sup> It is also worth noting, by way of context, that in 2006 decisions as to permitted national emissions under the Scheme’s Phase II (2008-12) were taken. The Phase II cap for EU 27 is 2,098 Mt/yr, cutting Member States’ suggested allocations in NAPs by 245 Mt/yr (10.4%). The largest absolute cuts were in Poland (76Mt), Germany (29Mt), Bulgaria (25Mt) and the largest relative cuts in Baltic states (ave. 37%). These figures represent a cut of 130MtCO<sub>2</sub> (6.0%) below 2005 verified emissions and 160MtCO<sub>2</sub> (7.1%) below 2007 verified emissions. See *Carbon 2008 - Post-2012 Is Now*, Point Carbon (2008) 28, Table 1.

<sup>115</sup> For the established case law on this question, see Jans and Vedder, *supra* note 88 at 209-214.

<sup>116</sup> [2002] E.C.R. I-6677.

<sup>117</sup> [2004] E.C.R. I-3425, on appeal from the Court of First Instance.

<sup>118</sup> See generally Craig and de Búrca *supra* note 100 at 509-528.

to add to the Court's already heavy workload. The Court fears that it will not be able to manage the increased number of cases which might be brought if the conditions applicable to private parties were relaxed.<sup>119</sup>

Whatever the justification of the Courts' 'severe' approach to standing, *EnBW Energie Baden Württemberg* casts a long shadow over the EU ETS case law. Cases brought by private parties that have no prospect of success – that is, where the Commission raises a plea of inadmissibility and the CFI reiterates its conclusions in *EnBW Energie Baden Württemberg*, that cases brought by private parties, not Member States, are 'inadmissible' since the Article 230 test of "direct and individual concern"<sup>120</sup> is not met in these cases – are an important curiosity of the case law. Such cases include *Drax Power and Others v. Commission*<sup>121</sup> (the operators of the UK's largest power station), *U.S. Steel Košice v. Commission*,<sup>122</sup> (the monopoly steel producer of Slovakia), *CEMEX UK Cement v. Commission*,<sup>123</sup> *BOT Elektro Belchatow and Others v. Commission*<sup>124</sup> and a further set of actions seeking the annulment of the Commission's Decision on the Polish NAP.<sup>125</sup>

Why did so many corporate actors, presumably with access to excellent legal advice, choose to pursue legal actions which had no prospects of success, owing to the Community Courts' well known position vis-à-vis locus standi and Article 230(4)? An informational gap is not plausible but a glance at the territorial location and core businesses of the applicants is revealing. All are located in eastern European 'Accession' Member States and all are thermal-power generators or other heavy industrial actors. The significance of location goes to the fact that such member states, especially Poland, have vast coal reserves and an industrial base which has yet to modernize and adopt that best available combustion technologies. Moreover, the deepest of the Phase II cuts to permitted national emissions under the EU ETS, took place in Poland, Germany, Bulgaria, and the Baltic states.<sup>126</sup> Accordingly, these are actors with much to contest in the operation of the scheme.

In a previous work, the author speculated about the motivation of Central and Eastern Europe industrial litigants in the following terms:

Accepting the possibility that market actors in the energy, minerals and ferrous metals industries have been 'encouraged' by their national governments to challenge decisions, there is perhaps an element of both playing to national audiences (against 'Brussels' and 'Europe') and seeking to pressurize the Commission's decision making processes – the latter strategy at least seems to have been singularly unsuccessful.<sup>127</sup>

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<sup>119</sup> E Biernat, *The Locus Standi of Private Applicants under article 230 (4) EC and the Principle of Judicial Protection in the European Community*, Jean Monnet Working Paper 12/03, NYU School of Law (2003).

<sup>120</sup> Supra note 97.

<sup>121</sup> [2007] E.C.R. II-67.

<sup>122</sup> [2007] E.C.R. II-127.

<sup>123</sup> [2007] E.C.R. II-146. The sought annulment by the cement producer to the Commission's Decision on the UK's phase II NAP alleged that Commission did not object to (i.e. approved) an under-allocation by the UK to the applicant in respect of one of its plants, thereby discriminating in favour of cement manufacturers in competition with the applicant and constituting illegal State Aid. As a consequence, *CEMEX UK Cement v. Commission* Case T-313/07 was removed from the Court's register.

<sup>124</sup> [2008] E.C.R. II-225.

<sup>125</sup> *Gorażdże Cement v. Commission* Case [2008] E.C.R. II-186. The argument was that Commission infringed Articles 9(3) and 11(2) and inter alia the principle of cooperation by applying its own method to determine Poland's total allocation and imposing this on Poland. In effect, this restricted Poland's total allowance to a level markedly lower than that notified, which had been consistent with that Member State's Kyoto obligations. The other dismissed cases were *Lafarge Cement v. Commission* [2008] E.C.R. II-188, *Dyckerhoff Polska v. Commission* [2008] E.C.R. II-189, *Grupy Ożarów v. Commission* [2008] E.C.R. II-190, *Cementownia "Warta" v. Commission* [2008] E.C.R. II-192, *Cementownia "Odra" v. Commission* [2008] E.C.R. II-193, *CEMEX Polska v. Commission* [2008] E.C.R. II-194.

<sup>126</sup> Supra note 114.

<sup>127</sup> Supra note 5.



Interviews with senior power executives in Central and Eastern Europe have revealed that there was some accuracy in these speculations.<sup>128</sup> Industrial actors in at least one of these jurisdictions sought annulment of the Commission's Decision on the Polish NAPs not with a view to succeeding but "to support our government in its negotiations with Brussels." Actually gaining an annulment of the administrative decision of the Commission was known by the applicants to be impossible.

Accordingly, the goal of the litigation is a purely political one. This is a form of litigation in which what is sought is the testing of boundaries in order to publicize the cause (of major emitters and the allegedly unjustified costs of the EU ETS on their businesses) and pressurize adversaries and allies. In the case of the numerous, apparently 'hopeless' challenges to the NAPs, the heavy industrial sectors in the new accession Member States of the European Union can be understood to have strategically deployed litigation at the European level. Whether or not in formal concert with their national governments, the challenge they mount to supranational policy is played out not in court (where it is only formally addressed, with a perfunctory dismissal) but to strengthen their national government's negotiating position in European Council negotiations. Given the changes to the Scheme brought about by Phase III amendments<sup>129</sup> it is certainly arguable that there is a significant relationship between the case law as characterized and the challenges of EU enlargement.<sup>130</sup> Phase III's introduction of the auctioning of allowances makes provision for 'redistribution mechanisms' by which 10 per cent of allowances are to be redistributed to Member States with low per-capita income as a solidarity mechanism.<sup>131</sup> While such 'tweaks' to the EU ETS are a logical response by the EU to the possibility of the 'enlargement' economies (that is, the more recently acceded Member States) developing an unhealthy reliance on cheaper and cleaner Russian gas, it is also not fanciful to infer that such a concession is a response to their grievances over the costs of the EU ETS to their traditional industries, as expressed in part by the EU ETS case law.

Different legal issues (but within a very similar context) arose in the most recent of the major EU ETS cases, *Poland v. Commission*<sup>132</sup> and *Estonia v. Commission*.<sup>133</sup> In 2006 these Member States notified the Commission of their allocation plans for Phase II of the scheme, which plans (as indicated earlier<sup>134</sup>) were substantially amended by the Commission, which reduced the total annual quantity of emissions proposed by Poland and Estonia by 26.7 per cent and 47.8 per cent respectively. These decisions were challenged by both Member States who were supported by other regional Member States. The Court of First Instance commenced from the position that the Commission can reject a NAP only if it can establish that a plan is incompatible with the criteria established in the Directive. In the present case, however, the rejection was based on the reliability of the data the Member States used, with the Commission ignoring that data and substituting it with its own data obtained by way of its own methods. The Court held that to do so was for the Commission to exceed its own powers under Article 249, which leaves to the Member State the choice of method to achieve the result intended by the Directive.<sup>135</sup>

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<sup>128</sup> Informal interviews with senior power company executives from 'enlargement' Member States, 1 March, 2010.

<sup>129</sup> Phase III of the EU ETS – to run from 2013-2020 – was negotiated approximately at the same time of these challenges, see *Communication of the European Commission*, COM (2008) 0016 Final. These amendments are given legal form as per note 83 supra.

<sup>130</sup> E Morgera & G Marín Durán, *Enlargement and EU Development Policy: an Environmental Perspective* 13 RECIEL 152 (2004).

<sup>131</sup> A further 2% of allowances are redistributed to those Member States which had achieved early progress against Kyoto Protocol reduction targets and proceeds of auctioning 300m allowances are to be set aside to subsidise the development of carbon capture and storage demonstration plant, or other innovative renewable energy technologies. *Communication of the European Commission*, MEMO/08/796 Q7.

<sup>132</sup> Case T-183/07 (23 September 2009), unreported at the time of writing.

<sup>133</sup> Case T-263/07 (23 September 2009), unreported at the time of writing.

<sup>134</sup> Supra note 114.

<sup>135</sup> This case shares many resemblances with the earlier EU ETS case of *Germany v. Commission* [2007] E.C.R. II-4431.



Two further findings, both relatively rare, were made by the Court. Firstly it made a reference to the subsidiarity principle as enshrined in the second paragraph of Article 5 EC,<sup>136</sup> which limits the capacity of EU institutions to act (vis-à-vis Member states) in areas which do not fall exclusively within their competence unless they are better placed to act. As Member States have a margin of manoeuvre in drawing up their NAPs, the Commission was thereby debarred from imposing a single means of assessing their NAPs for all Member States.<sup>137</sup> Secondly, and in respect of the Estonian case only, the Court struck down the Commission's decision on the basis that it was in breach of the principle of sound administration, for want of examining carefully and impartially all the relevant aspects of the case.<sup>138</sup> This led the Court to

conclude that the Commission did not properly examine the national allocation plan submitted by the Republic of Estonia ... in the context of its assessment of the question whether the reserves provided for in Article 3(1) and (2) of Decision 2006/780 were included in the total quantity of allowances proposed. In consequence, it infringed the principle of sound administration and, in that respect, this plea is well founded.

The 'boundary-testing' litigation in the EU can be seen as a series of attempts by Member States and private parties coordinating with them to limit the impacts of the EU's ambitious climate change policy on their activities and those of enterprises operating on their territory. In response to these pressures, ECJ has adopted a highly restrictive interpretation in the overwhelming majority of cases, in particular those concerning the admissibility issue. What might have appeared to be a highly formalistic Court, adhering to sometimes obscure procedural rules, might be better characterized as one committed to holding Member States, or those acting at their behest, to their political compacts. For the most part, the position of the Court has contributed to the creation of a stable market and to generating a substantial certainty dividend – especially prevalent in cases such as *Arcelor*. Whilst the aftermath of the *Poland* and *Estonia* decisions in October 2009 could be seen as regressive (in that they annul the Commission's attempt to reduce emissions from those Member States by tens of millions of tonnes of CO<sub>2</sub> per annum, these considerations have to be offset against the Court's requirement that the Commission heeds other normative arrangements that certainly are 'progressive', such as consultation rights (which are otherwise rendered nugatory by the Commission standing in shoes of national authorities), subsidiarity and claims of localism, and the interests of sound administration (as in the Estonian case). These are unarguably necessary features of a predictable and stable carbon market and so decisions such as *Poland* and *Estonia* may contain complexities beyond the dyad of pro/regressive.

#### 4. Perfecting

The final category of climate change litigation, like the first, is at present thinly populated. Described as 'perfecting', it occurs at the thus far rare intersection of litigation that takes place in a highly regulated environment for the express purpose of raising yet higher the environmental performance of a polity or those operating within its territory. The discussion herein focuses on a single case from the UK that has yet to be heard but contains many of the features that may become more common in the future.

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<sup>136</sup> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

<sup>137</sup> Supra note 134, para 80.

<sup>138</sup> *La Cinq v Commission* [1992] ECR II-1, paragraph 86; *Asia Motor France and Others v Commission* [1993] ECR II-669, paragraph 34; *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, paragraph 99.

*The Queen on the Application of People and Planet v. H.M. Treasury*,<sup>139</sup> concerned the UK Government's recapitalization of the Royal Bank of Scotland during the credit crisis and was an application for a grant of permission to bring judicial (administrative) review proceedings. The UK Government's 70 per cent shareholding in the Bank is held in by a special-purposes vehicle known as UK Financial Investment Limited (UKFI) which is wholly owned by the Treasury. The claimants (an NGO) argued that whilst under UKFI's ownership, RBS took a series of investment decisions – inter alia, partaking in a \$500 million loan to a coal-dependent US power generator company, the co-financing of a loan to the largest 'power seller' in the US which is heavily dependent on unabated coal combustion, involvement in a £1.4 billion loan for an oil company whose involvement in exploration and extraction allegedly exacerbated conflict on the border between Uganda and the DRC – that were damaging to the environment by reason of their carbon emissions or were insufficiently respectful of human rights. More pertinently, the claimant argued that UKFI's policy of adopting a 'commercial approach' in its arm's length management of RBS was contrary to the 'legitimate expectation' that government would not expend public money on "projects that have the most obviously detrimental impact on climate change".<sup>140</sup> The second head of claim was that the decision to adopt 'the policy' was taken without proper consultation of the Treasury's 'Green Book', the internal guidance manual of the Treasury which guides decision-making within central government and which despite its name has no dedicated environmental slant. As to the first claim, the Court conceded that whilst section 1 of the Climate Change Act 2008<sup>141</sup> creates a broad duty on the Secretary of State, it does not lead to the precise 'legitimate expectation' claimed. That head of claim was dismissed and described as "hopeless".<sup>142</sup>

As to the principal claim, whilst the Treasury accepted that the Green Book applied to its exercise of powers over RBS, it disagreed that it constrained its discretion so narrowly that it was unable to reconcile competing considerations in the manner that it did. Mr Justice Sales agreed:

HM Treasury was perfectly entitled to form the view that [banking regulation as it regards climate change] was a large topic not suitable to be resolved in the context of [the Green Book] assessment ... Policymakers retain a large measure of discretion as to what considerations they may take into account or leave out of account when conducting an assessment in accordance with the Green Book ... in accordance with ordinary principles of public law.<sup>143</sup>

The application was accordingly dismissed, but similarities with the 'promotive' case law discussed above are present, principally in the attempt to unfold existing law for climate change 'positive' reasons. In the present circumstance, though, the existing law was, in addition to the Green Book, the UK's ambitious Climate Change Act. Although the Court declined to read the Act in the expansive manner sought, there is every possibility that future challenges will see more nuanced attempts in areas that are not as highly charged as multibillion-pound bank bailouts.

[INSERT FIGURE 3 ABOUT HERE]

Figure 3 maps out the case law discussed herein, which when read together with table 1 allows us to read the case law in a manner that is sensitive to and consistent with the underlying character of the litigation. Thus, whilst we might not be incorrect to categorize the EU ETS cases as 'regressive'

<sup>139</sup> [2009] EWHC 3020 (Admin) per Mr Justice Sales.

<sup>140</sup> *Ibid.*, para 7.

<sup>141</sup> "s.1(1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline.

(2) "The 1990 baseline" means the aggregate amount of—

(a) net UK emissions of carbon dioxide for that year, and

(b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas. "

<sup>142</sup> Para 11.

<sup>143</sup> Para ??.

in that they sought to (and in cases such as *Poland v. Commission* succeeded in) raising the quantity of greenhouse gas emissions that could lawfully be emitted, that tag may not capture all that is going on. Applicants in such cases were also engaged in a series of actions to test the parameters of a major piece of industrial policy legislation. They were challenging the administrative procedures of the top-level regulator, which in some cases violated important procedural safeguards, such as public consultation, and in others was condemned by the Courts as unsound. They were making challenges about the validity of the scheme on the basis of discrimination between different industrial sectors. They were using litigation as part of a supranational bargaining game in which legal failure merely generated political legitimacy domestically with concomitant negotiating dividends.

## V. CONCLUSION

The foregoing has sought to engage with the full range of climate change caselaw whilst clarifying its basic nature through asking a series of rudimentary questions. Yielded, I hope, is not merely the simple answers to those enquiries but a set of tools by which the caselaw can be organized with a degree of conceptual clarity and accuracy that the literature has not always had.

The ‘what’ of climate litigation is answered straightforwardly – this is the body of caselaw that uses court or tribunal processes with the aim of securing emission reductions (or some other ‘climate change good’) or stymies attempts to do the same. An alternative, possibly more contentious definition would refer to legal challenges which implicate climate change policy and norms. We are also better able now to understand the motivations of actors (‘why’) – the ‘promoting’ type of litigation is motivated by attempts to mobilize and galvanize key actors, especially in circumstances of inertia or inaction at higher governmental levels (e.g. *Massachusetts v. EPA*) whilst the boundary-testing cell is better characterized as counter-mobilization. Unsurprisingly, this intersect neatly with the identity of those actors (‘who’). The caselaw analysis finds that promoting litigants are commonly networks of NGOs or other civil society actors and sub-state units attempting, reflecting the level at which dedicated climate change regimes *are* taking hold and where the system-wide blockages exist.<sup>144</sup> Those engaged in counter-mobilization in the boundary-testing cell, like the NGO networks, are on occasion also networked although here the lead players appear to be industrial actors who may (e.g. *Poland v Commission*) or may not co-ordinate with their national governments. Differences in the framing of claims is also discernible. Whilst promoting litigants make their claims in terms of climate change impacts that are readily grasped by a broader public (to whom often the co-addressees of their claims), those engaged in counter-mobilization, having no such broader audience have adopted a more technocratic mode of argumentation – the ‘how’ question. This is certainly necessitated by the nature of the body of law engaged with but not inconceivably also by their strategic desire not to achieve a broader audience. In distinguishing between regimes with and without Kyoto emission reductions commitments (or cognate schemes) the question of the legal spaces within which certain types of litigation congregates is addressed. In scholastic terms, this can aid the task of comprehensiveness in research. Analyses which address only cases arising in jurisdictions without (or with) Kyoto Protocol commitments can only ever be incomplete and partial, which is unproblematic so long as that limitation is plainly acknowledged. Often in the literature it is not. Finally, the issue of time and timing. This is revealed in at least two different ways. Firstly, the counter-mobilizing suits of the boundary-testing cell are brought by parties who are repeat players – the docket of the European Community Courts and Table 1 highlight that clearly for the purposes of the EU ETS. The mobilization literature (Part III above) will readily explain that by reference to the applicants’ access to resources, encouragement from their national governments and very significant stakes at play. Whether the inverse is true for

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<sup>144</sup> See in particular, B Rabe, *Statehouse and Greenhouse: The Merging Politics of American Climate Change Policy* (2004).

‘promoting’ parties in less clear. Secondly, although it was stated above<sup>145</sup> that the four cell types were nominal not ordinal, it might be argued that the categories can assist in the identification of trends. Whilst it is not done here, one could speculate that over time there will be a shift in most polities (with the US being a possible outlier here, as in other areas of international governance) in the preponderance of caselaw, from the ‘defensive’ to ‘promotive’ to ‘boundary-testing’ and finally onto ‘perfecting’.

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<sup>145</sup> At note 40 supra

Figure 1 – The Two-By-Two Matrix

		ENVIRONMENTAL CONSEQUENCES	
		NEGATIVE	POSITIVE
CLIMATE CHANGE REGIME	NON-DEDICATED		
	DEDICATED		

Figure 2 – Cell Types As Categorical Variables

ENVIRONMENTAL CONSEQUENCES

NEGATIVE

POSITIVE

CLIMATE CHANGE REGIME

NON-DEDICATED  
DEDICATED

DEFENSIVE	PROMOTIVE
BOUNDARY-TESTING	PERFECTING

Figure 3 – Categorizing Caselaw

ENVIRONMENTAL CONSEQUENCES

NEGATIVE

POSITIVE

CLIMATE CHANGE REGIME

NON-DEDICATED

DEDICATED

<p><i>Coalition for Responsible Regulation v. EPA</i></p>	<p><i>Massachusetts v. EPA</i>  <i>In the Matter of Quantification of Environmental Costs</i>  <i>Australian Conservation Foundation v. Latrobe Gbemre v. Shell Petroleum Development Co.</i></p>
<p><i>Société Arcelor Atlantique v. Premier Ministre</i>  <i>EnBW Energie Baden Württemberg v. Commission</i>  <i>Poland v Commission</i></p>	<p><i>People and Planet v. HM Treasury</i></p>

Table 1

<b>Legal Instrument</b>	<b>Number of Actions</b>	<b>Years in Force</b>	<b>Actions per Annum</b>
<b>DIR 2003/47 EC</b> (Emissions Trading Directive)	43	6	7.2
<b>DIR 2004/35 EC</b> (Environmental Liability Directive)	7	3	2.3
<b>DIR 75/442 EEC</b> (Waste)	59	30	2.0
<b>DIR 92/43 EEC</b> (Habitats protection)	25	16	1.6
<b>DIR 85/337 EEC</b> (Environmental Impact Assessment Directive)	34	22	1.5
<b>DIR 79/409 EEC</b> (Wild Birds protection)	42	29	1.4
<b>REG 259/93 EEC</b> (Control of Shipments of Waste)	17	14	1.2
<b>DIR 2000/60 EC</b> (Water Framework Directive)	5	6	0.8
<b>DIR 96/82 EC</b> (Protection from Major Industrial Accidents)	7	10	0.7
<b>DIR 2006/11 EC</b> , codifies <b>DIR 76/464 EEC</b> (Pollution by Dangerous Substances Directive - aquatic environ)	17	34	0.5
<b>DIR 80/68 EEC</b> (Groundwater Protection Directive)	11	27	0.4
<b>DIR 90/313 EEC</b> (Freedom of Access to Information on the Environment Directive)	5	13	0.4
<b>DIR 67/548 EEC</b> (Relating to the classification, packaging and labeling of dangerous substances)	7	38	0.2